In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE INTERSTATE COMMERCE COMMISSION, Appellant,

v.

ALPHEUS B. STICKNEY AND CHARLES H. F. Smith, Receivers of the Chicago Great Western Railway Company; Chicago Great Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Illinois Central Railroad Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; The Chicago & Alton Railroad Company; The Chicago, Rock Island & Pacific Railway Company; and the Atchison, Topeka & Santa Fe Railway Company, Appellees. } No. 251.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR APPELLANT.

I.

STATEMENT OF THE CASE.

This suit was filed in the Circuit Court of the United States in and for the District of Minnesota, Third Division, on the 7th day of May, 1908, by the appellees, to enjoin an order of

the Interstate Commerce Commission, made October 21, 1907, and reissued on the 10th day of December, 1907, as follows:

> It is ordered that the defendants, The Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & Alton Railroad Company; Chicago, Rock Island & Pacific Railway Company; Atchison, Topeka & Santa Fe Railway Company; and Illinois Central Railroad Company, be, and they are hereby, required to cease and desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of that State, their present terminal charge of $2 per car.
>
> It is further ordered that said defendants be, and they are hereby, notified and required to establish and put in force on or before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the State of Illinois, a terminal charge which shall not exceed $1 per car, if any terminal charge is maintained by them.

On May 11, 1908, the Attorney-General filed his certificate to expedite the hearing of the case under the acts of February 11, 1903, and June 29, 1906, and on the 28th day of June, 1908, the defendant filed its answer (Rec., 34) in said cause, denying all the equities of the bill, attaching as exhibits the decision, report, and opinion of the Commission on which the order was based (Rec., 43–51), and the same came on for hearing upon bill and answer and supporting affidavits and exhibits, before Circuit Judges Sanborn, Adams, and Hook, who, thereafter, on June 30,

1908, entered an interlocutory order, suspending the order of the Interstate Commerce Commission, enjoining the enforcement of the same, and requiring the railroads, parties to the action, to make and maintain a certain record with respect to the shipments of live stock to the Union Stock Yards, to give a bond to comply with the orders of the court, and to pay any damages sustained by shippers by reason of the injunction. (Rec., 67.)

From this interlocutory order the Commission now appeals to this court. (Rec., 74.)

The bill.

Briefly stated, the bill of complaint of the railroad companies, appellees, is as follows:

They allege that they had duly published their charges for the transportation of live stock to their own terminals in the city of Chicago; that these charges did not include any compensation for transportation beyond their own lines, and the delivery of the same to the Union Stock Yards; that this latter transportation and delivery involved a separate and distinct service; that after the Union Stock Yards were established, and until the year 1894, the appellees delivered live stock to such Union Stock Yards without any charge whatever; that in 1894, when the Union Stock Yards and Transit Company imposed against the appellees for the use of its tracks a trackage charge, varying from 80 cents to $1.50 per car, it became impracticable for the appellees to continue transporting live stock beyond their own lines and over the tracks of said Union Stock Yards and Transit Company, and delivering the same to the Union Stock Yards without charge, and they therefore issued, published, filed, and posted a separate tariff of $2 per car for the special service of transporting live stock beyond their lines and for making delivery thereof at the Union Stock Yards; that the appellees meant by this tariff that said charge of $2 was the sole and

only charge for said service; that the same was segregated and entirely separate from the through charge on live stock; that the cost of this terminal service ever since 1894 has exceeded the sum of $2 per car; that the order of the Interstate Commerce Commission reducing this charge to $1 was unjust, oppressive, and unlawful because $2 was less than the actual expense to the railroads and $1 was less than half such expense; that the Commission had already found that this terminal service cost the railroads more than $2 per car; and, finally, that the order of the Commission would deprive the railroads of their property without due process of law, in violation of the Constitution of the United States.

The railroads' bill of complaint did not contain or have attached a copy of the report or opinion of the Commission, or the evidence before it upon which its order was based.

The answer.

The Interstate Commerce Commission for answer denied the equities of the bill and recited the various proceedings (beginning with the first complaint of the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange in 1896), which finally led up to the order complained of in this case. The Commission asserted that its order was made after due and full hearing, and attached to its answer as Exhibit A the report and order of the Commission in the present case (Rec., 42), and as Exhibit B the report and order of the Commission in another proceeding involving the same subject-matter between substantially the same parties (Rec., 51).

The Commission further alleged that the $2 charge was not the only compensation received by the railroads for the service of transporting live stock to and delivering at the Union Stock Yards; that such charge and service were not segregated from the charge and service for the through transportation; that the $2 terminal charge was a mere addition

to the compensation already embraced in the through rate and was not imposed for the purpose of covering the cost of a particular part of the service, but was an arbitrary increase of the through rate for transporting the same freight and performing the same service that previously had been transported and performed without this additional charge, and that the appellees could not, by setting forth in their tariffs a statement that the $2 charge was for a special and separate service, alter the fact that it was a mere addition to the through rate.

The Commission denied that appellees had any adequate terminal facilities of their own for the delivery of live stock shipped to Chicago, and that the railroads pretended to have provided such facilities for the mere purpose of giving color to the claim that they had live-stock depots in Chicago other than the Union Stock Yards. The Commission alleged that the through rates in force prior to June 1, 1894 (when the $2 extra charge was imposed), were sufficiently high to include, did include and now includes, the delivery of live stock at the Union Stock Yards, and that there has been no increase in the expense of this delivery except the imposition of a trackage charge by the Union Stock Yards and Transit Company, which trackage charge would be fully covered by $1 per car

The Commission further alleged that the $2 charge imposed by the railroads constitutes an undue preference to other markets and an unjust discrimination against Chicago; that said charge was the result of a contract or combination between the railroad companies in restraint of trade, within the meaning of the antitrust act; and, finally, that the $2 charge imposed by the carriers is excessive and that no irreparable or material injury could result from the enforcement of the Commission's order.

Supporting proof to bill and answer.

The affidavits offered in support of the appellees' bill in the court below (Rec., pp. 20 to 33, inclusive) are made as to each railroad by some official thereof and are all to the effect that the companies construe their tariffs to mean that the through rates apply only to certain points on their own lines, respectively, in the vicinity of Chicago; that they do not apply to the Union Stock Yards; that the $2 charge is for transportation to and delivery at the Union Stock Yards beyond the tracks of the railroads; that the money received for such additional service is kept on the books of the companies separately from the account for receipts of money for transportation of live stock; and that the $2 charge constituted the only compensation for the service beyond their own rails and for delivery at the Union Stock Yards. The depots claimed by the companies to be the live-stock stations on their own lines in the vicinity of Chicago are, respectively, as follows (Rec., 95, 96): Of the Chicago, Burlington & Quincy, Hawthorne; of the Illinois Central, Hawthorne; of the Chicago, Milwaukee & St. Paul, Galewood; of the Chicago & Alton, Brighton Park; of the Chicago, Rock Island & Pacific, Ninety-fourth street; of the Atchison, Topeka & Santa Fe, Corwith.

In the tariffs (Rec., 95 to 98, inclusive) the railroads denominate the $2 charge in various ways, but in every instance it amounts to an addition to the through rate. For example, the Chicago, Burlington & Quincy tariff declares that the $2 "will be added to the rates herein published to and from Chicago;" the Chicago, Milwaukee & St. Paul tariff says $2 per car "in addition" will be charged; the Chicago & Alton uses the words "in addition to the rates named in this tariff;" the Chicago, Rock Island & Pacific, "in addition to the regular tariff rates;" the Atchison, Topeka & Santa Fe, "an additional charge of $2 per car will be added to the rates."

The Interstate Commerce Commission submitted, in connection with its answer, the exhibits thereto attached, Exhibit A being a report and opinion of the Commission dated October 21, 1907, on which the order on this question was issued (Rec., pp. 42 to 50) and Exhibit B being a report and opinion of the Commission in a previous proceeding involving the same controversy (Rec., pp. 51 to 64).

II.

ASSIGNMENT OF ERRORS.

The Commission assigned and here urges the following errors in the order and decree of the Circuit Court:

1. The court erred in not dismissing the bill because there is no equity in it;
2. The court was without jurisdiction;
3. No irreparable injury was shown;
4. There was no allegation or showing by the railroads that the terminal charge of $1 per car, together with the through rate on shipments of live stock, deprived them of property without due process of law;
5. The Commission was right as a matter of law in considering the through rate in connection with the terminal charge in order to determine the reasonableness of the latter;
6. There was no allegation or showing that the cost of the service of transporting live stock from the end of the carriers' rails to the Union Stock Yards, independent of the cost of unloading, the cost of maintaining delivery agencies, and the cost of returning empty cars, was more than $1 per car;
7. The court erred in holding that the carriers had segregated the terminal service and the terminal charge from the through service and the through rate;
8. The court erred in holding that the interstate commerce act requires a charge for terminal services to be separately scheduled, and that the Commission should have determined the reasonableness of such charge by the cost of the terminal service alone;

9. The court erred in holding that the Commission is without power to reduce or forbid a terminal charge, however reasonable in itself, when an adequate terminal charge is already embraced in the through rate.

III.

History of the controversy before the courts and the Commission.

This controversy has been going on for fifteen years. It has been the subject of five decisions in the lower federal courts and one decision in the Supreme Court.

The Interstate Commerce Commission has heard the complaints of the shippers and the defense of the railroads time and time again and has made five reports and orders on the subject, in each case holding that the terminal charge imposed by the railroads was excessive and unreasonable.

The controversy began in 1894, when the railroads imposed for the first time a terminal charge of $2 per car for the service of transporting live stock from the ends of their own rails in Chicago and delivering the same at the Union Stock Yards. From 1865, when the Union Stock Yards were constructed, to June 1, 1894, there was no charge for delivering live stock there. The Union Stock Yards, and the connection tracks leading to them, were built by the Union Stock Yards & Transit Company, a corporation organized by the railroads for their own convenience and for the purpose of establishing a single market for live stock. The result was that all the other markets were abandoned, slaughterhouses were located in the vicinity of the union yards, and these became the sole place in the city of Chicago, where cattle, sheep and hogs were marketed for slaughter. The railroad rate to Chicago carried with it, in all cases, delivery at the Union Stock Yards. As time went on the railroads parted with their interests in the stock yards company, and, in 1894, the control of the company had passed out of their

hands. Then the stock yards company imposed a trackage charge for the use of their rails by the carriers of an average of about $1 per car. The railroads tried in vain to prevent the imposition of this charge, and being unable to do so, they, in turn, imposed upon the shippers over their roads a charge of $2 per car for delivering live stock at the Union Stock Yards.

This extra charge by the railroads was imposed June 1, 1894. The first complaint to the courts was in the form of a proceeding by Keenan and others, shippers, against the receiver of the Atchison, Topeka & Santa Fe Railroad Company, appointed by the Circuit Court for the Northern District of Illinois. On November 26, 1894 (*Keenan et al.* v. *Receiver of A., T. & S. F. R. R. Co.*, 64 Fed., 992), the court ordered the receiver to discontinue the levying of any terminal charge, holding that the railroads were bound to carry to the Union Stock Yards, which was the live-stock depot in Chicago, for the one through rate. This case was reversed by the Circuit Court of Appeals upon the proposition that the railroads could, if they desired, make one charge for the transportation of freight to Chicago and another separate charge for delivery at the Union Stock Yards, and that there was no contention in the case that the amount of the terminal charge was unreasonable. (*Walker et al.* v. *Keenan et al.*, 73 Fed., 755.)

The first complaint to the Interstate Commerce Commission was made on September 1, 1896, by the Cattle Raisers' Association of Texas, and on March 10, 1897, by the Chicago Livestock Exchange. The petitioners alleged that the charge of $2 per car for delivery at the stock yards was unjust and unreasonable and was a discrimination against Chicago and in favor of other cities to which cattle was shipped from the same territory. The railroads answered that the terminal charge was just and reasonable, denied the discrimination, and asserted that the $2 per car was exacted because of the

trackage charge required by the stock yards company, and that previous to the imposition of this trackage charge the service of delivering cattle from the end of the carriers' rails to the Union Stock Yards was rendered gratuitously. The Commission held that the additional charge of $2 per car for delivery at the Union Stock Yards was unjust and unreasonable, under the circumstances, because compensation for this service was already included in the through rate, and that, assuming the correctness of the principle announced in the Keenan case, to wit, that the railroads were entitled to divide their rates and make one charge for transportation to Chicago and another charge for delivery at the Union Stock Yards, the railroads had not, in fact, divided their rates, and that their action in notifying the public of the extra charge and filing rate sheets containing it did not constitute a division of their rates but amounted merely to an addition thereto.

This *first report and order* of the Commission was made January 20, 1898 (7 I. C. C., 513). On application for a rehearing a *second report and order* of the Commission was made August 4, 1898. (7 I. C. C., 555a.)

The railroads declined to obey the order and suit was brought in the Circuit Court of Chicago to enforce it. The same defense was made before the court that had been made to the Commission. The case was decided in favor of the railroads December 4, 1899. The court held that the railroads had separated the terminal charge from the through rate, as they had the right to do under the *Keenan case;* that $2 was just and reasonable for the terminal service; and that no compensation for this service had previously been included in the through rate, but that such service had been performed for thirty years gratuitously. (*Interstate Commerce Com.* v. *C. B. & Q. R. R. Co. et al.*, 98 Fed., 173.) On June 15, 1900, the Circuit Court of Appeals affirmed this decision expressly on the authority of *Walker* v. *Keenan*, as decided by the Circuit Court of Appeals, denying to the Commission the

right to consider both the terminal charge and through rate together in determining the reasonableness of the terminal charge (*Interstate Commerce Commission* v. *C. B. & Q. R. R. Co. et al.*, 103 Fed., 249), Judge Grosscup, who had previously decided the same question against the contention of the railroads (64 Fed., 992), dissenting. The case was carried to the Supreme Court and there decided June 2, 1902 (*Interstat Commerce Commission* v. *C. B. & Q. R. R. Co. et al.*, 186 U. S., 320).

This court, in an opinion reviewing the controversy from its inception, overruled the court of appeals, wherein that court held that the Commission must treat the terminal charge by itself, and sustained the Commission in every contention on the merits, holding that the through rate had always included a charge for delivery at the Union Stock Yards; that the railroads had never divided their rates so as to separate the charge for the terminal service from the charge for the through service, but had merely added $2 to the through rate; that the Commission was right in determining the reasonableness of the terminal charge by considering the fact that compensation for the terminal service was already included in the through rate, whether segregated or aggregated, and that, under these circumstances, the terminal charge was unjust and unreasonable. This court, however, was obliged to affirm the court below, because it appeared in the report of the Commission, upon which its order was based, that the through rates on live stock to Chicago from some points embraced in the territory covered by the complaint, had been reduced in 1896, 5 cents per hundred pounds, or from $10 to $15 per car, and since the Commission had only found the $2 terminal charge to be unreasonable by considering it in connection with the through rate, it could not be unreasonable on shipments from these points from which the through rate had been reduced $10 to $15 per car; and since it did not appear in the

report of the Commission what those points were it followed that no part of the Commission's order could be enforced.

This court, however, in order to make its position clear, stated at the end of the opinion that its refusal to execute the order of the Commission should not be construed as preventing that body from commencing other proceedings to correct any unreasonableness in the charge on shipments from territory to which the reduction in the through rate did not apply.

The Cattle Raisers' Association and the Livestock Exchange (on Feb. 28, 1903) filed another petition with the Commission setting forth that rates from that territory to which the reductions of 1896 applied, had since been advanced, and were then higher than they were before June 1, 1894, and praying the Commission to reopen the case, define this territory, and order the carriers to discontinue the terminal charge from that and from all other territory. The railroads claimed the case could not be reopened and that the controversy was ended by the decision in the 186 U. S. The Commission, however, took the suggestion of the Supreme Court in the closing paragraph of its opinion and reopened the case to give both sides an opportunity to show what the territory was to which the reduction applied, and held if there turned out to be any territory from which there had been no reduction, the Commission would enforce an order against the $2 charge on shipments from that territory, unless the railroads could show that the through rate from that territory was reasonable and just, notwithstanding the addition of the $2 charge. This, the *third report* of the Commission, was made March 4, 1904. (*Cattle Raisers' Ass'n* v. *C., B. & Q. R. R. Co.*, 10 I. C. C., 83.)

The Commission, upon the reopening of the case, designated the territory covered by the reductions of 1896, and found that twenty-nine thirtieths of the shipments by the railroads had come from territory which was not included

in such reductions. The Commission then went into the whole question of through rates and their reasonableness, both when considered alone and in connection with the terminal charge. A great volume of evidence was submitted by the carriers and the complainants. The carriers claimed that the through rates were low enough to justify the additional charge at Chicago, and the complainants insisted that the through rates were high enough to include, and did include, compensation for this service. The Commission excluded the territory covered by the reductions of 1896 (although it found that as to that territory there had been three advances since the reductions, and the rates had become higher than they had ever been since they were first filed with the Commission in 1887). As to the territory not included in the reductions of 1896 the Commission found that the through rates were ample to cover the terminal charge, and ordered the railroads to cease any exaction for this purpose, over and above the $1 per car, which was the average charge by the Stock Yards Transit Company. This, the *fourth report and order* of the Commission, was made August 16, 1905 (*Cattle Raisers' Ass'n of Texas et al.* v. *C. B. & Q. R. R. Co. et al.*, 11 I. C. C., 277). No proceedings were begun for the enforcement of this order. In other proceedings to which all the railroads involved in this case were, among others, parties, the Commission had also examined the cattle rates from the west to Chicago, St. Louis, and Kansas City and had again found this terminal charge at Chicago to be unjust and unreasonable. (*Cattle Raisers' Ass'n of Texas* v. *Missouri, Kansas & Texas Ry. Co. et al.*, 11 I. C. C., 296, decided August 16, 1905.) Also in *The Matter of Class and Commodity Rates from St. Louis to Texas Common Points* (11 I. C. C., 238) the subject of live-stock rates and the effect of the advance in the cost of labor and supplies on all rates were fully considered and discussed, and the Commission

found, independent of the $2 terminal charge, that certain advances in through rates in the spring of 1903 were unjust and unreasonable.

Then came the amendment to the interstate commerce act, known as the "Hepburn Act," on June 29, 1906 (34 U. S. Stat., 584). Section 15 as amended authorized the Commission to fix maximum rates after a hearing. Before this amendment the Commission could only require the railroads in this case to cease charging $2 for the alleged terminal service at Chicago, and the railroads could have obeyed the order by reducing the charge to $1.99; since this amendment the Commission has power to establish a rate above which the railroads can not charge. Before this amendment the Commission was required to enforce its order in the courts; since the amendment the order of the Commission stands unless the railroads overthrow it in the courts. Before this amendment the function of the Commission in holding a rate to be unreasonable was judicial in character; since the amendment the action of the Commission in fixing a rate is legislative in character.

On December 3, 1906, after the passage of the Hepburn Act, the Cattle Raisers' Association and the Live Stock Exchange presented the new complaint which is the subject of the present suit. The railroads again objected, contending that the decision in 186 U. S. closed the matter, but the Commission held that this could not bar its right to examine the question anew in the light of present conditions and under the new powers granted by the amendment of June 29, 1906; that this was not a reopening of the case, and for that reason was not susceptible to the objection which the railroads had made before. Under stipulation of the parties all the testimony taken in the former proceedings was considered by the Commission, and a vast amount of additional testimony was introduced (Rec., 47). The Commission made this its *fifth and final order* October 21, 1907.

(Rec., 42; *Cattle Raisers' Ass'n* v. *C., B. & Q. R. R. Co. et al.*, 12 I. C. C., 507.) The order was reissued December 10, 1907. The Commission now again sets out the territory covered by the reductions of 1896 (Rec., 49), so that its order may be limited to shipments from territory not covered by such reductions if this court should so require. The Commission proceeds to find, however, that while these reductions were as a rule 5 cents per hundred pounds, rates from this same territory were generally advanced in February, 1899, 2½ cents per hundred pounds and in December of the same year 3 cents per hundred pounds, making a total advance of 5½ cents per hundred pounds, and leaving in effect a rate higher than that before the reductions of 1896. Further, the Commission finds that in the spring of 1903 these same rates were again advanced 3 cents per hundred pounds, and this is the rate now in effect. The order of the Commission then requires the railroads to cease charging more than $1 per car for delivery at the stock yards upon all shipments of live stock from points outside of Illinois. The present suit to enjoin this last order of the Commission was brought May 7, 1908, in the Circuit Court of the United States for the District of Minnesota. The decision of the court below was rendered June 30, 1908. (*Stickney et al.* v. *Interstate Commerce Commission*, 164 Fed., 638.) (Rec., 86.)

IV.

The present case is stronger for the Commission than that in which this terminal charge was condemned in 186 U. S.

The case which now comes to this court does not differ substantially from that which was decided in 186 U. S., except in so far as the position of the Commission has been strengthened. This court has expressly decided the $2 terminal charge at Chicago under the circumstances to be unjust and unreasonable, and the circumstances have not

changed except as they now disclose less justification for the charge. The facts now before the court are the same as those considered in the previous case, except that the action of the Commission is now supported by additional findings.

The only real differences between the case as made before and the present suit are as follows:

First. The present order of the Commission has been made in conformity with the new powers conferred by the act of June 29, 1906.

Second. While the Commission had not examined the through rates in the case before this court in 186 U. S., but had presumed them to be reasonable in the absence of evidence, and had held merely that the $2 additional charge was unreasonable, *the Commission has in this case taken hundreds of pages of testimony on the subject of the through rates* and heard arguments on both sides, expressly finding, as the result of this investigation, that the through rates on live stock to Chicago were, in 1894, have been ever since, and are now, sufficiently high to include, and do in fact include, the terminal service, except only as the cost of such terminal service has been increased at the average of $1 per car by the Stock Yards Transit Company.

Third. The Commission has found, in this case, that no advances or reductions on any of the through rates have had any relation whatever to the $2 terminal charge, but that this terminal charge has been simply imposed as an addition to the through rate. (Rec., 55–58 and 46–50.)

Fourth. With respect to the territory covered by the reductions of October, 1896, the Commission has found that the rates from such territory had increased from that date to December, 1899, until they had become higher than they were before the reductions; and further, that in the spring of 1903, after the decision in 186 U. S., these same rates were again advanced 3 cents per hundred pounds, and are *now higher than ever before.*

Fifth. The Commission expressly finds in this case that the railroads, parties hereto, *have not, in fact, separated* the terminal service and terminal charge from the through service and through rate. (Rec., 60, 63.)

Sixth. The Commission expressly finds in this case that the various points in Chicago to which, by their tariffs, the railroads, parties hereto, claim the through rates apply, *are not, in fact, the depots for the delivery of live stock* shipped to Chicago, but that the *Union Stock Yards is the depot for that purpose* of all said railroads; and that the depots claimed by the railroads are maintained solely in order to make such claim; and that some of said railroads do not even pretend to have any other depot than that at the Union Stock Yards. (Rec., 44, 61, 63.)

Seventh. The Commission finds in this case that the cost of transporting live stock from the end of appellees' rails and delivering at the Union Stock Yards, even including the $1 charge of the transit company, *is not more than half the average cost of delivering carload freight in the city of Chicago.* (Rec., 48, 62.)

Eighth. It does not appear in this case that the $1 terminal charge, which the Commission permits to stand, is unreasonably low for the service *which it alone purports to cover.*

Ninth. The Commission has found that the through rate to Chicago, plus the $1 per car, fully and amply compensates the railroads *for the whole service* of transporting live stock from the points of origin outside of Illinois and delivering the same to the Union Stock Yards.

Tenth. The railroads do not claim that the charge *for the whole service* rendered the shipper of live stock, after the reduction of $1 per car in Chicago, is now unremunerative or unjustly low.

It thus appears that the case now before this court presents even stronger reasons for upholding the action of the Interstate Commerce Commission than those which were

controlling on the merits of the controversy in 186 U. S. The court below, however, declares that the present case is to be distinguished from the one before decided by this court on the ground that the wording of the tariffs imposing the $2 terminal charge is different. In effect, the circuit court holds that the $2 charge in the present case is *more segregated* than it was in the previous case. As we shall point out later, the only difference between the two cases is that in the present case the tariffs of *all* the railroads involved declare that their live-stock depots are at certain points in and about Chicago, whereas in the former case only the tariff of the Atchison, Topeka & Santa Fe road contained such language. *In both cases the terminal charge was, and is, a mere addition to the through rate.* In neither case is there any bona fide attempt to "divide their rates and thus to make a distinct charge from the point of shipment to Chicago, and a separate terminal charge for delivery to the stock yards," as this court pointed out they might do in the previous case (186 U. S., p. 335).

It is further to be observed that, in the previous case before this court, the tariff of the Atchison, Topeka & Santa Fe road was worded in precisely the same way as appellees claim is the effect of all the tariffs in the present case, and it follows that the question as to whether or not such mere words in the tariffs constitute a division of the whole rate and a segregation of the terminal charge has already been passed upon. The exaction of the $2 for delivery at the Union Stock Yards was in the former case, and is in this case a mere addition to the through rate, which through rate then and now already embraced and included a charge for the same service.

ARGUMENT.

The controlling points in this case will be submitted in the following order:

First. The power of the Commission to make orders, such as the one here involved, is legislative in character, and an order so made can not be set aside by the courts unless it violates property rights guaranteed by the Constitution.

Second. The Commission did not commit an error of law in considering the terminal charge and through rate together, under the circumstances.

Third. The order of the Commission does not deprive the railroads of any property right even though $1 per car be less than the cost of the terminal service.

Fourth. It is not shown that the $1 terminal charge fixed by the Commission is less than the cost of the terminal service, or is unreasonably low.

Fifth. The order of the Commission applies only to the whole service of shipping livestock to Chicago and delivering at the Union Stock Yards, and there is no claim that the charge fixed for this service deprives the railroads of fair compensation.

FIRST.

As to the power of the Commission and the Courts.

The act of June 29, 1906, gives to the Interstate Commerce Commission the power to prescribe maximum rates after a full hearing upon complaint. Congress has conferred this power in conformity with the constitutional duty "to make all laws which shall be necessary and proper for carrying into execution" the clause respecting the regulation of interstate commerce. Congress has prescribed the general rule that all railroad rates shall be reasonable and not unduly discriminatory, and has imposed upon the Commission the duty of prescribing what particular rate in a given instance will conform to this standard. The act declares the rate

fixed by the Commission to be the maximum prescribed by law, and commands obedience to that law as if the rate itself had been designated in the statute.

The fixing of rates, whether by a legislative body or by a commission duly authorized, is a legislative act. *Maximum Rate case*, 167 U. S., 499; *Reagan* v. *Farmers Loan and Trust Co.*, 154 U. S., 362; (*Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1; *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19; *Prentis* v. *Atlantic Coast Line*, 211 U. S., 210; *The Home Telephone Co.* v. *Los Angeles*, 211 U. S., 265; *Honolulu Transit Co.* v. *Hawaii*, 211 U. S., 282.)

It follows that the courts can not suspend or set aside an order of the Interstate Commerce Commission prescribing a maximum rate unless it clearly appears—

> First. That the Commission has not proceeded in the manner required by the Interstate Commerce Act; or,
>
> Second. That the rate prescribed constitutes a confiscation of property.

In the case at bar the Commission proceeded regularly under section 15 of the interstate commerce act, as amended, and exercised its power to reduce this rate after a full hearing, upon complaint, as required by section 13. Therefore, the results reached by the Commission will not be disturbed by the courts unless it clearly and conclusively appears that by the order made the railroads are deprived of property without due process of law, or without just compensation.

Under the old law the function of the Interstate Commerce Commission was in its nature judicial. It passed upon the reasonableness of existing rates and the courts reviewed its conclusions just as they review those of an inferior judicial tribunal, treating the Commission as a referee of the circuit courts of the United States (37 Fed., 614); (*New Orleans & Texas Pacific Ry.* v. *The Interstate Commerce Commission*, 162 U. S., 184; *Maximum Rate*

case, 167 U. S., 479.) Under the Interstate Commerce Act as now amended the Commission fixes the rate and the courts have the same authority to review that they would if the rate had been fixed by Congress itself. The so-called "Court Review" amendment, which is embodied in the act of June 29, 1906, merely declares that to be the law which would be the law without such declaration. The only thing added is the venue of such cases and the express authorization of suits against the Commission as a representative of the Government.

It is not the reasonableness of the rate which is now before the court; that is a question which is submitted exclusively to the Interstate Commerce Commission. The rate fixed by the Commission may in the judgment of the court be unreasonable and yet it will not be declared unlawful unless it is so unreasonable as to constitute a confiscation of property. As this court said in the Knoxville Water case, *supra*—

> The courts in clear cases ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind.

And again in *San Diego Land & Town Co.* v. *National City*, 174 U. S., 739, 754—

> Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.

It certainly can not be said in the case at bar that the order of the Commission presents a clear case of confiscation of property. However the Commission reached its conclusion; whatever facts or circumstances it considered; whether the process by which it arrived at the result was right or wrong—the court can not find in the order made a violation of the

constitutional rights of the carriers. Unless a confiscation of property clearly appears the order ought to stand.

SECOND.

The Commission did not commit an error of law in considering the terminal charge and the through rate together.

The court below in holding that the Commission had committed an error of law in considering the terminal charge and the through rate together, declared that the railroads had "published the terminal charge in question for service beyond their lines rendered necessary to complete the transportation undertaken by them;" that they had made this charge a "separate matter, as they had the undoubted right under the law to do," and that "neither the Commission nor the courts have the right to complicate it with any other service in determining the reasonableness of a charge fixed for it."

Here is the whole issue in a few words, and we submit that the court below is clearly in error.

The very question as to the right of "the Commission or the courts" to consider this terminal charge and the through rate together has been expressly determined in the affirmative by this court. In *C., B. & Q. R. R. Co. et al.* v. *Interstate Commerce Commission*, 186 U. S., 320, this court examined the same facts and held that the Commission was right in its former order when it reduced the terminal charge because the through rate already embraced compensation for the same service.

Coming to consider whether in the previous case there was a separation of the charge for carriage and the charge for terminal service and whether the rate for the latter service was just and reasonable, this court say, at page 336:

> Did the carriers, in June, 1894, when they imposed the alleged terminal charge of $2, separate in their

> schedules this charge from the through rate? That is, did they divide their charges by setting apart the terminal charge embraced in their previous through rate so as to segregate it from the through rate, thus making one distinct terminal charge and another distinct through rate? The mere inspection of the schedules demonstrates that such division was not made. This is the convincing result, since the schedules did not purport to draw out from the previous through rate the sum of compensation contained therein for terminal services. On the contrary, the entire previous through rate was retained, and a memorandum was placed upon the schedules to the effect that thereafter an additional charge of $2 for delivery at the stock yards would be exacted. This was a mere addition to the sum of the terminal charge embraced in the prior through rate. We think that it can not be said that to add an additional amount to a former charge was necessarily to divide such former charge, without holding that to add one sum to another is necessarily to divide the other.

There has been no change in facts or circumstances since the above statement was made by this court. The Commission in this case has expressly found that the carriers have never segregated the terminal service from the through service and that compensation for the former continues to be included in the rate for the latter. The court below holds that the railroads have separated these two services, but *the thing done* by the railroads is precisely the same as that which was shown in the case previously before this court.

The tariffs filed by the railroads, appearing in the record in this case, show that the $2 terminal charge is imposed in substantially the same way as it was in the tariffs formerly before this court. In every tariff the charge appears as a mere addition to the through rate. (Rec., 95–97.) The only possible difference is that some of the railroads which in the previous case did not even make a pretense of terminal

depots in Chicago, other than the Union Stock Yards, now set up such claim. But even in this respect the same facts were before the court in the former case because the tariff of the Atchison, Topeka & Santa Fe road made the same claim of a live stock depot in Chicago (other than the Union Stock Yards) that other appellees are now making for the first time. (Rec., p. 198, *C., B. & Q.* v. *Interstate Commerce Commission*, 186 U. S., 320.) In other words, the very question as to the effect of the pretended depots was involved in the former case and did not in any manner affect the decision. All these facts were before the Commission in the case at bar and the Commission found that the railroads had not in fact any depots for the delivery of live stock except the Union Stock Yards. The various affidavits filed by the railroads do not alter the facts in any degree whatever. These affidavits signed by some official of each railroad simply state that the "tariff provisions are construed" by the railroad "to mean" that the $2 charge was for a separate and distinct service segregated from the through service. (Rec., 33.) These affidavits do not show or claim that the compensation for this terminal service is not already embraced and continued in the through rate. The Commission found that "what the railroads had done in this case was not to separate the rates upon this live stock, but to make an arbitrary addition to the previous rate" (Rec., 45); and that "the sole result of the imposition of the terminal charge was to increase the cost to the shipper of $2 per car while the service remained identically the same." (Rec., 44.) That cost and service remain the same to-day.

Nor do the paper depots change the facts. Upon this subject the Commission found that some of the railroads about June, 1894, "provided in a very limited way such facilities at various points in and around Chicago, but in no cases were these facilities adequate to the handling of any

considerable number of animals. The railroads perfectly understood that shippers could not avail themselves of these facilities and the only purpose of providing them was to give color to the claim that they had in the vicinity of Chicago some live-stock depots other than the Union Stock Yards. Several of the defendants did not even make this pretense" (Rec., 44).

But it is claimed that the amendment to section 6 of the interstate commerce act, passed since the previous case was before this court, has altered the situation, and that now the carriers are *required by law to add a separate charge for terminal service* in all transportation of freight, and that the Commission is *required by law* to pass upon the reasonableness of this specific charge independently of all other charges. This contention may be dismissed in a few words. On the subject of terminal charges the only difference between section 6 of the interstate commerce act before and after the amendment of June 29, 1906, is that under the old law the railroads are required to "state separately *the* terminal charges," while under the new law they are required to "state separately *all* terminal charges." There may be a distinction, but certainly there is not a difference between the obligation of stating *the* terminal charges which railroads impose and that of stating *all* terminal charges. *In neither case is there an obligation to make any terminal charge.* All the law meant and means is that in any case in which a carrier exacts a terminal charge that charge must be separately stated.

In the case at bar, just as in the case involving the same controversy in 186 U. S., the railroads attempt to make this $2 charge a separate item for a separate service, but the fact is that it is merely an addition to the through rate. It is not in fact a terminal charge or a terminal service. The transportation of live stock to the Union Stock Yards is as much

a part of the carrier's duty as the transportation over any other portion of the journey from the point of shipment to the market. The same cars, the same engines, and the same crews operate over the tracks of the Transit Company from the end of the carriers' rails in Chicago to the Union Stock Yards that are used over any other part of the journey from the point of shipment to the market. The tracks in Chicago that lead to the Union Stock Yards are a part of the "railroad" operated by the carriers as defined by section 1 of the Interstate Commerce Act. They are a part of their roads under section 6 of the Interstate Commerce Act, as amended June 29, 1906, because while formerly the carrier was required to state in its schedules "the places *upon its railroad* between which property and passengers would be carried," it is now required to state "the places between which property and passengers will be carried" and these places mean any points, either upon the carrier's own rails or upon the rails of another, over which it has authority to operate its trains.

If we look to further changes in the act which affect the question of separate charges we find that by the first section the new duty is imposed on the carriers to "establish through routes and just and reasonable rates applicable thereto." This has reference to "transportation" as defined in that section. It then declares that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid *or in connection therewith* shall be just and reasonable." The obligation to make the rates from point of origin to destination is complete and the right to make just and reasonable charges in connection therewith is complete, but the Commission has full power to determine what is "just and reasonable" under the circumstances in either case.

The railroads have created the Union Stock Yards. They have made it their depot. They have made it the only avail-

able place for delivering live-stock in Chicago. They have made it the greatest live stock market in America. They have used it as such for thirty years. They can not now by pretending to create a terminal service and by pretending to construct other live-stock depots charge an extra fee or an additional rate for delivering at the Union Stock Yards (*Covington Stock Yards* v. *Keith*, 139 U. S., 128). Certainly they can not make any charge above the $1 imposed upon them by the transit company. The requirement of the interstate commerce act that the railroads shall separately state the, or all, terminal charges means of course such terminal charges as are in addition to the through rate, and does not mean such terminal charges as are included in the through rate, or such as are imposed for a service which is a necessary part of the through service.

Aside from the legal right of the Commission as thus shown to consider the through rate in determining the reasonableness of the so-called terminal charge, there are practical reasons which must commend themselves to this court. Counsel for the railroads say that the Commission ought to reduce the through rate to Chicago and leave the terminal charge alone. But these through rates to Chicago are made from a vast number of points by a great number of railroads. To deal with these rates exclusively it would be necessary to cite before the Commission all the railroads and make orders reducing all the joint rates. It is not conceivable that Congress intended the Commission to proceed in any such way if in its judgment complete justice could be secured by simply reducing the terminal charge. The through rate is expressed in a certain amount per hundred pounds; the terminal charge is expressed in a certain amount per car. The contents of cars varies from 14,000 to 30,000 pounds. Now, if the Commission must let the terminal charge stand and take out its equivalent from the through rate, how is the amount per car to be translated into, or

expressed in, an amount per hundred pounds? Even if it were possible of exact expression the result to the shippers would be the same as if the Commission had simply reduced the terminal charge. Why require the Commission to reduce the through rate when the railroads have improperly added the terminal charge which was already included in the through rate? Why not permit the Commission to undo the very thing that the railroads have improperly done? Why not permit the Commission to correct the error by eliminating it? Who can possibly be injured by doing this if on the whole it is right?

The effect of the carriers' contention is that the manner of doing the wrong justifies it.

If the Commission is to deal effectively with these transportation problems its power must be as broad as that of the traffic manager. Whatever rate the carrier can impose the Commission must have power to remove or modify; otherwise its remedies will never reach the wrong. If the railroads in this case had, instead of imposing the terminal charge, raised the through rate by an amount equal to the same revenue, the Commission might then of course have dealt with the through rate. If on the other hand, the railroads, in imposing this terminal charge, had reduced the through rate by an amount equal to the terminal charge there would have been no complaint. But the railroads under the guise of creating a special terminal service have simply added $2 per car to the through rate, and we submit that the Commission did the only just and practicable thing when it reduced the terminal charge after finding that it was already included in the through rate which was high enough to compensate the railroads for the full service.

There is another reason which justifies the Commission in reducing the terminal charge rather than the through rate. As stated by the Commission (Rec., 50), live stock from very

much of the territory involved in this case can be marketed at many different points like Chicago, St. Louis, Kansas City, and Omaha, and the rate is an important factor in determining to which of these markets the shipper will send his stock. The rates to these different markets bore a certain appropriate relation to each other. When the $2 terminal charge was put on at Chicago and no like charge was put on at St. Louis, Kansas City, or Omaha, there was an unjust and undue discrimination against the Chicago market, and the only way in which this discrimination, forbidden by the interstate commerce act, could be dealt with by the Commission was by reducing the terminal charge. The bill and the decision of the circuit court completely ignores this feature of the Commission's findings. It is an integral part of the report and opinion on which the order is based and is in nowise negatived in the bill nor in the proofs offered. In this the bill is fatally defective.

We submit, therefore, that the Commission was not only right in law but that its duty, under all the circumstances, was to consider the terminal charge and the through rate together, and having found that the through rate was already high enough to, and did, include the service of delivering live stock at the Union Stock Yards to reduce the terminal charge.

THIRD.

The Commission's order does not violate constitutional rights even if $1 is less than the cost of terminal service.

The court below based its decision on the ground that the $1 charge, fixed as a maximum by the Commission, is confiscatory, or is, at least, beyond the power of the Commission to establish because it is admitted that the entire service of transporting live stock from the end of the railroad companies' tracks to the Union Stock Yards, of delivering the

stock there, and returning the empty cars is more than $1, and is, indeed, more than $2, which the roads themselves charge for this service.

The rule adopted by the court below is that where railroad companies publish a terminal charge for terminal service, and the Interstate Commerce Commission is called upon to declare whether or not the same is reasonable, the Commission must, as a matter of law, determine this question solely by the cost of the terminal service, independent of the fact that the through rate already includes compensation for the terminal service and independent of the fact that the transaction as a whole is profitable to the roads.

We submit that such a rule is not sustained by reason or authority. To uphold it is to say that the railroads can charge twice for the same service, and the Commission is without power to strike off the charge which is last put on. We submit that even if the railroads had in this case, actually and in good faith, separated the terminal service from the through service, and the terminal charge from the through charge, the Commission could reduce the terminal charge if they found that the through charge was high enough to include it.

But the railroads have not separated these two services and charges. They *can not separate the services* because a shipment of live stock from the point of origin to the Union Stock Yards is one transaction and inseparable. They *have not separated the charges* because the through rate still includes compensation for the terminal service, and the terminal charge is simply an addition to the through rate. They have never attempted to "draw out from the previous through rate the sum of compensation contained therein for terminal services," as this court said in the former case (186 U. S., p. 336). All the affidavits, tariff sheets, and arguments submitted by the railroads can not change a fiction into a fact.

It is clear, therefore, that if a carrier adds a charge for a pretended separate service, which is already included in another service for which he is amply paid, the Commission may reduce the extra charge, *even to a point below the cost of the pretended separate service.*

There is nothing in the recent case of *Southern Railroad Co.* v. *The St. Louis Hay & Grain Co.* (214 U. S., 297) which is contrary to this view. In that case this court held that a carrier stopping goods in transit for inspection and unloading for the benefit of a shipper is entitled to compensation in addition to the actual expense incurred. There was no contention in that case that the service performed was a part of the transportation of the goods from the origin of the shipment to destination. Nor did it appear that the carrier, as in the case at bar, had already been paid for the specific service.

The railroads in this case admit that this terminal service has long been, and now is, paid for by the through rate. They admit this when they say that $2 is below the cost of the terminal service. If the through rate formerly included the terminal charge, as this court expressly found in 186 U. S., and if the $2 now imposed is still insufficient to pay the cost of the terminal service, the railroads must either be performing a service gratuitously (an assumption which can not be indulged) or compensation for it must still be in the through rate. To put the matter in another way: The charge for this terminal service has been found by this court to be included in the through rate, and the railroads are now contending that it is not there, although they have never taken it out.

That the cost of a particular service is not a proper test of the reasonableness of the charge for it when the service performed is part of a larger transaction is abundantly

supported. As this court said in *Minneapolis & St. Paul R. R.* v. *Minn.* (186 U. S., 257, 267):

> We do not think it is beyond the power of the state commission to reduce the freight upon a particular item, provided the companies are able to earn a fair profit upon their entire business.

In *St. Louis & S. F. R. R. Co.* v. *Gill* (156 U. S., 649) this court held that passenger rates over a single part of a railroad could not be held to be confiscatory without considering the whole rate and the effect of the rates upon the profitableness of the whole road.

To the same effect see *Atlantic Coast Line R. R. Co.* v. *N. C. Corp. Com.* (260 U. S., 1); *Cov. & Lex. Turnpike Co.* v. *Sanford* (164 U. S., 596); *A. & V. R. R. Co.* v. *Railroad Com. of Miss.* (203 U. S., 496); *Railroad Co.* v. *Well & Neville* (96 Tex., 408).

In the Atlantic Coast line case, *supra*, this court points out the difference between the consideration of a particular charge and a whole schedule of rates, saying at page 24:

> "In a case involving the validity of an order enforcing a scheme of maximum rates, of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself, demonstrates the unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety."

It follows that, in the present case, even if $1 per car be below the cost of the particular service, the railroads can not complain, since the whole charge for the whole service is admittedly profitable.

FOURTH.

It is not shown that the one dollar terminal charge, fixed by the Commission, is less than the cost of the terminal service.

The railroads in this case contend that the order of the Commission requires them to perform this so-called terminal service below cost. They say that the Commission has heretofore found that the charge of $2 per car is less than the actual expense to the carriers in rendering the service.

The answer to this is that neither the railroads, in their proofs offered below, nor the Commission, in its report, undertake to show what the extra cost is to the appellees of delivering live stock at the Union Stock Yards instead of at their pretended depots in Chicago. The only evidence on that subject is the trackage charge of the transit company, averaging $1 a car, and this is allowed by the Commission. There is no evidence of any other extra expense whatever.

It is true that the entire cost of transporting the cars, delivering the stock at the Union Stock Yards, paying terminal agency expenses, and returning empty cars, including the average $1 trackage charge, may be $2 or more per car, but how much of this expense would be necessary for deliveries at other terminals in Chicago does not appear. Therefore there is no basis for the claim that $1 per car is less than the extra expense incurred by the railroads in delivering at the Union Stock Yards instead of elsewhere. As this extra expense is the chief excuse made by the railroads for imposing the extra charge they can not complain if the order of the Commission reduces the extra charge to the only extra expense which is shown. With respect to all other freight in Chicago, the average cost per carload for delivery is more than twice that of live stock. (Rec., 48, 62.)

This claim of the railroads that the Commission's order requires them to perform the alleged terminal service for less than cost, and that the cost of such service is more than $2, requires them to contend for too much. The railroads themselves make the $2 charge, and if this is below the cost it only evidences the fact that the railroads look to the through rate for compensation for the terminal service. They can not be presumed to perform any service gratuitously. (*Interstate Com. Com.* v. *C., B. & Q. R. R. Co.*, 186 U. S., 320; *Pierce* v. *Milwaukee R. R.*, 23 Wis., 38.) They can not convince by the assertion that they are either willingly or unwillingly performing a service for less than cost *so long as they retain full pay for it in another pocket.*

FIFTH.

Commission's order applies only to whole transaction of shipping live stock from points of origin to Union Stock Yards, and there is no claim that charge fixed for this service deprives railroads of fair compensation.

Even if it be true that $2 per car is below the cost of the terminal service, considered as a distinct and separate transaction, it will be seen from the language of the Commission's order that the railroads are not required to perform the terminal service as a distinct and separate transaction. The order of the Commission requires that the railroads shall put in force, on or before the 1st day of February, 1908, a terminal charge which shall not exceed $1 per car, if any terminal charge is made, for delivery at the Union Stock Yards. This service is never performed or required except where the through rate is also paid. There is no such thing as a shipment of live stock beginning at the end of the appellees' rails in Chicago and ending at the Union Stock Yards. The Commission's order merely requires that no more than $1 per car shall be charged by the railroads for delivery at the Union Stock Yards

"with respect to shipments of livestock transported by them from points outside the state of Illinois."

In other words, the railroads are not required to do anything for the $1 alone. They are only required to haul live stock from points outside of Illinois to the Union Stock Yards, Chicago, at the same rates they have heretofore received, plus $1, made necessary by the trackage charge of the transit company.

The railroads do not, anywhere in the record in this case, contend that this sum for the entire service is below the cost of such service, or fails to yield a fair and full compensation.

CONCLUSION.

Every intendment of law and fact should avail to support the Commission's order.

In submitting this case we respectfully suggest that every consideration affecting either the public or the railroads should incline the court to uphold the order of the Commission. This controversy has been prolonged. The Commission has made repeated investigations of the subject, has invariably reached the same conclusion, and has found but one effective remedy.

For fifteen years the railroads carrying live stock from the West into Chicago have persisted in adding this unjust and discriminatory sum to the through rate. They have made this increase under the guise of a special charge for a terminal service, using the fact that the company over whose rails they deliver live stock to the Union Stock Yards imposed a trackage charge of $1 per car as an event to justify an increase to the shippers of $2 per car.

When all is said and done, the only purpose of this terminal charge, over and above $1 per car is to increase the revenues of the railroads for performing the same service which they had before performed without such charge.

This case turns almost wholly upon questions of fact, and the Commission's findings are and ought to be conclusive. The Commission has found as matters of fact:

1. That the railroads have never separated the so-called terminal service and terminal charge from the through service and through rate.

2. That the through rate now embraces compensation for the so-called terminal service.

3. That the through rates as to all territory from which cattle are shipped to Chicago are high enough to fully compensate the railroads for the whole service of transportation from the point of origin to delivery at the Union Stock Yards in Chicago.

4. That the tracks of the Union Stock Yards Transit Company are a part of the carriers' "railroad" as that term is used in the Interstate Commerce Act.

5. That the Union Stock Yards is the depot of the carriers for the delivery of live stock in Chicago.

6. That there has been no change in circumstances or conditions since the decision of this court in 186 U. S.

7. That no showing has been made that any loss will result from obedience to this order or that the business affected by it will not be profitable.

These facts being conclusively established, there can be no question as to the law applied to them. The order made by the Commission was the only order it could lawfully make.

When questions of fact are submitted to executive or administrative officers of the Government their conclusions are final. When questions so submitted involve both fact and law the conclusion will not ordinarily be disturbed by the courts. Even when a question of law only is submitted to other departments the courts will make every presumption in favor of the interpretation reached.

As stated by this court in *Bates & Guild Co.* v. *Payne*, 194 U. S., 106:

> The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not, ordinarily, review it, although they may have the power and will occasionally exercise the right of so doing.

Again, in *Marquez* v. *Frisbie* (101 U. S., 473) the court used, upon the same subject, this language:

> This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court can not so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.

We submit that the order of the Commission was right and that the bill of complaint of the appellees herein should be dismissed.

Respectfully submitted.

WADE H. ELLIS,
Assistant to the Attorney-General.
S. H. COWAN,
Special Attorney.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 251.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,
against
ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH,
RECEIVERS OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

ADDITIONAL BRIEF FOR APPELLEES.

Statement.

This is an appeal from an interlocutory decree suspending the enforcement of an order of the Interstate Commerce Commission (hereinafter referred to as the "Commission"), prescribing a maximum charge of $1 per car, in lieu of the charge established by the appellees of $2 per car, for the transportation by the appellees of live stock from their respective tracks in Chicago to the Union Stock Yards in Chicago.

Since 1904 the live stock schedules to which appellees are parties have shown explicitly that the rates to Chicago cover transportation only to points on the tracks of the appellees, and that a terminal charge of $2 per car is imposed for the transportation from any such point to the Union Stock Yards.

For example, the schedule of the Chicago, Milwaukee & St. Paul Railway shows rates on live stock in car loads between "Chicago, Ill. (Galewood Stock Yards)," and other stations, and contains the following provision:

> "NOTE.—This Company's railway does not reach the Chicago Union Stock Yards, and the rates given herein cover the transportation charges between the stations named and Galewood, Ill., Stock Yards only.
>
> "$2 per car in addition will be charged on live stock car loads when consigned to or from the Chicago Union Stock Yards. This terminal charge must be entered separately by waybilling agent in 'freight charge' column of way bill; also inserted on bill of lading and live stock contract" (Record, page 96).

Provisions to the same effect are in the schedules of all the other appellees (Record, pp. 95 to 98), and have been since 1904 (Record, pp. 20 to 33).

Undertaking to act under section 15 of the Act to Regulate Commerce (as amended by the so-called Hepburn Act of June 29th, 1906), the Commission after hearing upon a complaint ordered the appellee to cease and desist from exacting the terminal charge of $2 per car, and to put in force and apply during a period of not less than two years a charge not exceeding $1 per car (Record, p. 8).

The Commission, in its opinion, stated that the terminal charge of $2 per car had been the subject of complaint and litigation since 1896, and referred to its former decisions on

that subject, and to the decision of this court thereon in Interstate Commerce Commission *vs.* Chicago, &c., Railroad Company, 186 U. S., 320. The Commission's reasoning was the same as in its earlier opinions, and it stated: "The issues are the same as heretofore" (Record, page 47), and "we see no reason to change our former holding in this matter" (Record, page 48).

A portion of the Commission's former holding was

> "that looking entirely to the cost of service and including as a part of that cost the trackage charge paid the Union Stock Yards & Transit Company and the unloading charge paid that same company, the amount of this terminal, if, under the circumstances of this case, it is proper to impose the charge, is reasonable" (Cattle Raisers' Association against Fort Worth & D. C. R. Co., 11 I. C. C. Rep., 555*c*).

The Commission's theory in this case is that the charge of $2, while reasonable *per se*, is, to the extend of $1, included in the rate to Chicago and is justifiable only as to the remaining dollar, which represents the trackage charge imposed upon appellees since June 1st, 1894, by the Stock Yards Company. The Commission's precise holding was

> "that live stock rates from points in other States and Territories to Chicago over the lines of the defendants are sufficiently high to include a delivery at the Union Stock Yards save for the trackage charge exacted by the Stock Yards Company, and that the imposition of the $2 terminal charge for such delivery is unjust and unreasonable" (Record, page 48).

Commissioners Clark and Harlan dissented from the conclusions of the Commission (Record, page 50).

To restrain the enforcement of the Commission's order, the appellees filed this suit against the Commission, and upon the bill, answer and affidavits filed on behalf of complainants the temporary injunction was granted.

ARGUMENT

I.

Each appellee had the right to divide the charge for transportation so as to have one rate from point of shipment to a point on its tracks in Chicago, and a separate charge thence to the Stock Yards.

This right was declared by the Circuit Court of Appeals (Walker *vs.* Keenan, 73 Fed., 755), is admitted by the Commission (7 I. C. C. Rep., 548), is clearly recognized by section 6 of the Act to Regulate Commerce, and is expressly announced in Interstate Commerce Commission against Chicago, etc., R. R. Co., 186 U. S., 320, 335.

Commission's Counsel emphasizes that none of the appellees has on its tracks sufficient stock yards to accommodate the live stock shipped via its line. This fact, if relevant at all, bears only on the question of the right to segregate, and is manifestly irrelevant on that question. This Court has held in the case last cited that where the shipment is destined to a particular terminal which is beyond the carrier's line the carrier has the right to have one rate for the transportation over its own tracks, and a separate charge which shall be the exclusive compensation for the terminal charge beyond its tracks. If the carrier makes such segregation it is sufficient for the carrier to provide on its own tracks such facilities as may be necessary to accommodate shippers who elect not to avail of the terminal service. There is no suggestion that the facilities afforded on the tracks of each appellee are not sufficient for

this purpose. Even their insufficiency would not defeat the right to segregate, but would be a defect to be remedied at the instance of any shipper aggrieved. If all shipments invariably went to the terminal beyond the carrier's tracks, so that no unloading facilities whatever were needed or provided on the carrier's tracks at all, the right to segregate would still exist to the fullest extent.

Commission's counsel claims that "the same cars, the same engines and the same crews conduct the operations between appellees' tracks and the Stock Yards as conduct the operations over any other part of the journey from the point of shipment." This is not shown by the record, and the statement as to engines and crews is contrary to the universal practice of conducting switching service with entirely distinct organization and engines. Commission's counsel also claims that the terminal service is never performed except in connection with the transportation to Chicago. These comments could bear only upon the right to segregate; but notwithstanding such considerations this court has held that the carrier has that right.

II.

The appellees did in fact divide their rates so that $2 was the sole charge for the transportation from appellees' tracks to the Stock Yards.

The schedules of appellees are explicit on this point. The so-called Chicago rate applies, and since 1904 has applied, only to designated points on the tracks of appellees and covers no service beyond those points. The terminal charge of $2 is the sole charge for the service between the

tracks of the appellees and the Union Stock Yards. There is no ambiguity in the language of the schedules. If there were any such ambiguity it would be disposed of by the uncontradicted affidavits of the traffic and accounting officers of appellees (Record, pages 20 to 33), to the effect that the uniform practical construction of the tariffs has been that they have accomplished such segregation.

The question whether there has been such segregation is the vital question in this case. Commission's counsel say that there has not been, because "there has been no change in facts or circumstances since" the decision by this court in case last cited and because this court held in that case that there had not been such segregation at that time.

The situation before this Court in the former case was as follows:

For thirty years the carriers had in effect live stock rates "to Chicago," which included delivery at the Stock Yards (186 U. S., 336). By circulars effective June 1st, 1894, the carriers merely imposed an additional charge of $2.00 for delivery at the stock yards. But the carriers did not modify or further define the expression "to Chicago," and the live-stock rates continued to be rates "to Chicago," and therefore naturally continued to convey the idea that they included delivery at the Stock Yards.

The Commission's counsel seized on this substantial defect. On page 11 of their brief in this Court (in the former case), they characterized as a "figment of the imagination" the carriers' claim that they had limited the Chicago rate to their own lines, and counsel insisted that there had been no modification of the Chicago rate. On page 3 of their reply brief Commission's counsel pointed out that

section 6 of the Act required schedules to state the places between which property would be carried, and that the schedules of the Railway Companies made no "change in the destination reached by the through rate."

This Court pointed out (186 U. S., 337) that the Act to Regulate Commerce requires that the schedules shall plainly state the places between which property will be carried: that the purpose of this provision was to compel the schedules to be so drawn as to plainly inform of their import, and that when rates were changed the change should be so stated as not to mislead and confuse, "all of which would be frustrated if the schedules relied upon were given the effect which the defendants now claim for them."

Such considerations cannot apply to the schedules in force since 1904, which do modify the former Chicago rate by explicitly limiting it to a destination on the appellees' own tracks, thus plainly stating as the place to which the property will be carried for that rate a place different from the place which thirty years of practical construction had given to the mere word "Chicago." Surely the Commission and its counsel are mistaken in assuming that "there has been no change in the facts or circumstances" since the former decision by this court.

The only argument adduced by Commission's counsel to offset this radical change in the facts and circumstances is that in the former case the record showed that the Atchison, Topeka and Santa Fe, one of the nine carriers involved, did in 1896 specify the place on its own tracks to which the Chicago rate applied. But the Court's opinion was confined to the effect of the circulars of 1894, and an examination of the briefs shows that the Atchison Company's exceptional

provision in 1896 was not pressed upon the court. On the contrary, the Atchison Company elected to rely solely upon the circulars of 1894, which did not limit the Chicago rate to the carriers' own lines. This is evident from the brief filed on behalf of all the Railway Companies. The phraseology of the schedules as bearing upon the question of segregation is referred to on pages 5 and 30 of their brief, and at neither place is there any statement of the exceptional character of the Atchison Company's schedule of 1896. On the contrary, on page 30, the Atchison Company's circular of 1894 was quoted, and it was stated that all the other schedules were to the same general effect.

In that case this Court in showing there had been no separation of the terminal charge pointed out also (186 U. S. 336), that "the schedules did not purport to draw out from the previous through rate the sum of compensation contained therein for terminal services." The Court, however, did not hold that such a reduction in the rate to Chicago would be necessary to a segregation if the schedules expressly limited the Chicago rate to a destination on the tracks of the Railway Companies, and such a holding would have been in conflict with the clear rights of the carrier. The carrier had both the right to increase its Chicago rate and the right to restrict that rate to a destination on its own tracks. A restriction of the rate to a destination on the carrier's own tracks without any reduction of the rate was just as clearly within the carrier's rights as an increase in the Chicago rate would have been.

Commission's counsel lay stress upon the fact that the schedules provide that the terminal charge is *in addition to* the rates to the points on appellees' tracks, and seem to

assume that the use of the expression "in addition to" prevents what would be but for that expression a segregation of the terminal charge. The use of such expression is entirely consistent with the idea of segregation. Necessarily the terminal service is in addition to the service of transportation to points on the appellees' tracks, and necessarily the charge for the former is in addition to the charge for the latter. This fact would exist no matter how the idea of segregation should be expressed, and there can be no objection to recognizing the fact.

The only way to give legal effect to schedules published in accordance with the Act, and to avoid the confusion which would result from ignoring their proper effect, is to deal with the rates according to the service which those rates undertake to cover. The carriers and shippers are bound by the lawfully published schedules, and the Commission too must respect the legal effect of those schedules until changed in accordance with law. Otherwise the Commission sets at naught one of the law's fundamental objects, which was to secure certainty and accuracy in defining both the rate and the service.

This case presents the following curious situation: The Commission has investigated and reduced the terminal charge and has also investigated and reduced the Chicago rate (as to the Chicago rate see Cattle Raisers' Association of Texas *vs.* M. K. & T. Ry. Co., 13 I. C. C. Rep., 413; M. K. & T. *vs.* Interstate Commerce Commission, 161 Fed., 645). But the Commission refuses to give the legal effect to the schedules as published, and insists that the cost of delivery at the Union Stock Yards (other than the amount of the trackage charge) shall not be included in the terminal

charge, but must be included in the rate to Chicago, although this Court has held that the carriers have the right to include the entire cost of delivery in the terminal charge, and although the carriers have done so by an explicit declaration in their schedules.

If the court sustains the Commission's contention that notwithstanding the schedules now in force all of the terminal service (other than the amount paid for trackage) between the appellees' tracks and the Union Stock Yards continues to be included in the rate to destination on the appellees' tracks, the result is to deny to the appellees the right to make the segregation which in the former case the court distinctly upheld. It is impossible to make a segregation more clear than that now in force. The schedules expressly limit the Chicago rate to points on the tracks of the appellees and provide a separate charge for the separate service beyond those points. Either this is a segregation or the carriers have no right to make a segregation.

III.

If complete segregation has been lawfully made, appellees are entitled to have the terminal charge considered accordingly.

If a complete segregation has been lawfully made, the effect of that segregation is that the rate for the transportation from point of shipment to the point upon appellee's tracks is the compensation for that service, and the terminal charge is the compensation for the service thence to the stock yards. Unless this effect be given to the schedules the

right to segregate is in fact denied, although in theory conceded.

The Commission's counsel insist that the Commission has the right to take into consideration the profitableness of the rate to Chicago; that the Commission has extensively considered that subject; that it is more convenient to reduce the terminal charge than it is to reduce the through rate; that the reduced terminal charge is applied only when the service is performed in connection with the transportation to Chicago. All these facts were equally true of the order considered by this Court in the former case, and yet in that case this Court assumed that it could justify the Commission's determination of the question upon such considerations only if there was no complete segregation of the charge for the terminal service, and, therefore, the Court elaborately considered the question whether there had been such segregation. Such consideration would have been useless if the Commission's course would have been justified notwithstanding such complete segregation.

It is unnecessary in this case to consider how far in a proper case the Commission in prescribing the reasonable rate for a given service could look to the compensation received from other related services. In this case the Commission has refused absolutely to consider as a part of the terminal service factors which are essential elements of that service. In doing this the Commission has denied the right of segregation which this Court has upheld.

IV.

The Commission's order is contrary to the Constitution and to the statute.

(a) The Commission's order violates the Fifth Amendment of the Constitution.

The bill avers that the $2 terminal charge is less than the actual necessary expense of performing the terminal service, and that the $1 terminal charge prescribed by the Commission is less than one-half the actual necessary expense of performing the terminal service (Record, page 9). These averments are not denied by the answer.

The Commission's opinion upon the first complaint as to the original terminal charge stated that the Railway Companies showed that the average cost of performing the terminal service was $2.22 per car. The Commission analyzed to some extent the estimates of the Railway Companies, but did not dissent from, or modify, those estimates (7 I. C. C. Rep., 513, 526). The Commission in its opinion in this case refers to its former opinion and says "the issues are the same as heretofore," and "we see no reason to change our former holding" (Record, pages 47, 48).

Thus the Commission's order requires the carriers to perform a service for less than the cost of the service, and thus requires the carriers to devote their property and resources to a specific service without just compensation, and to that extent deprives the carriers of the rightful use of their property, and hence of the property itself, without due process of law.

The Act to Regulate Commerce deals with rates in detail. It prescribes that each rate for each service shall be just and reasonable, and in effect prohibits separately each undue preference. The act does not contemplate or authorize a general revision of all the rates of any one carrier, but contemplates that there shall be complaints only as to specific rates, and that the hearing by the Commission and the proceeding in court shall be directed to the specific rates complained of. The constitutionality of the Commission's act may be and must be determined by the specific thing the Commission does.

In Southern Railway Company *vs.* St. Louis Hay and Grain Company, 214 U. S., 297, 301, this Court has held that where a service is performed which is beneficial to the shipper and involves expense to the Railway Company, the latter is not limited to the actual cost of that service, but is justified in receiving some compensation in addition thereto.

In the present case the Commission not only denies all profit but also fixes the maximum rate much below the actual cost.

(b) There is no authority for the claim that, in order to set aside a rate prescribed by the Commission, the carrier must make a showing of confiscation as to all its business.

The Commission claims that its order prescribing a maximum rate cannot be set aside as unlawful unless the carrier can show that it is unable to earn a fair return upon its entire property from all its business of every character. This contention means that the revenues of the carriers are subject alone to the absolute and final control of the Commission down to the point where the net revenue becomes

less than a fair return upon the value of the property as a whole: that the commission dealing with one rate at a time may make reductions to a point far below the actual cost of the service, and yet may be unmolested in this course, provided the carriers have a fair profit left on their business as a whole.

This contention also means that the Commission's power over questions of undue preference between individuals, localities or descriptions of traffic is absolute and final, for the Commission can make the most far reaching readjustments of rate as between different persons, localities or descriptions of traffic, raising the rates in one instance and reducing them in the other, without reducing the total return of the carriers below a fair return on the property as a whole.

The cases relied upon to sustain this contention are not in point and will be briefly discussed.

Minneapolis and St. Louis Railroad Company vs. Minnesota, 186 U. S., 257.

The question was as to the reasonableness of a rate on hard coal in car load lots. The Railroad Company did not claim or show that the rates atacked would be unprofitable. Upon this point the Court said:

The rate complained of "was not met by any showing that at the rates fixed by the Commission there would be no profit or an insufficient profit upon the coal so transported" (page 265).

"The difficulty with defendant's case is that it made no attempt to show the cost of carrying coal in car load lots" (page 266).

From these references of the Court to the fact that the Railroad Company had not proved that the rate complained of was unprofitable it is manifest that such showing would have been relevant to the inquiry as to the constitutionality of the Commission's order.

What the Railroad Company did prove was that if all freight had been carried at the same rates as were fixed by the Commission for coal in car load lots, then the road would not pay operating expenses (page 266). It was in commenting upon this unsound theory that the Court stated that it might well be that existing rates not disturbed were sufficient to earn a large profit, and that companies were not entitled to earn the same percentage of profit upon all classes of freight.

Atlantic Coast Line vs. North Carolina Corporation Commission, 206 U. S., 1.

The Court pointed out (page 26) that the case did not involve the fixing of rates at all, but involved an order requiring a train service which it was the carrier's duty to furnish for the public convenience, and that as a carrier could be compelled to furnish adequate facilities, although pecuniary loss might result, there was a clear distinction between such an order and an order fixing rates.

The Court did not suggest even as a dictum that a rate could be constitutionally prescribed for the carrier which would be less than cost. On the contrary, the Court conceded for the purposes of that case (page 26) that such an order would be unconstitutional.

The cases holding unconstitutional a general scheme of rates because not yielding a fair return upon the carrier's

property were referred to by the Court simply because those cases had been relied upon by the Railway Company's counsel. The Court confined itself to stating what those cases involved and that they did not apply to a case involving an exercise of State authority to compel a carrier to perform a specified duty.

St. Louis, San Francisco Railway vs. Gill, 156 U. S., 649.

It appeared that the legislature of Arkansas prescribed a three-cent passenger fare. The St. Louis & San Francisco Railway undertook to prove that that rate was confiscatory as to a single division of its line extending from the Missouri State line to Fayetteville, a distance of thirty (30) miles. The company made no showing as to the rest of its line in the State. The court did not refuse to consider the confiscatory character of the rate prescribed, but merely refused to let the railway company select a fraction of its property to which the rate applied and prove confiscation as to that fraction.

Alabama, &c., Ry. vs. Mississippi R. R. Com., 203 U. S. 496.

The railway company had fixed a local rate available to some shippers and the railroad commission prescribed the same rate available to all. The question whether the rate afforded a reasonable compensation for the service rendered was not involved. The Court said:

> "Even if a State may not compel a railroad company to do business at a loss and conceding that a railroad company may insist, as against the power of the State, upon the right to establish such rates

> as will afford reasonable compensation for the services rendered, yet when it voluntarily establishes local rates for some shippers it cannot resist the power of the State to enforce the same rates for all" (p. 501).

(c) *The Commission's order was made under a clear error of law.*

The order of the Commission necessarily rests upon its theory that the terminal charge of the carriers did not and could not embrace any element of cost except the trackage charge of the Stock Yards Company. This theory is a pure error of law. The necessary legal deduction from the lawfully published schedules of the appellees is that the terminal charge embraces, and is the sole compensation for, all the elements of cost involved in the service between the appellees' tracks and the Stock Yards. The Commission's error of law in this respect is so fundamental as to vitiate its order. Thus a clear case exists for setting aside that order without in any respect undertaking to review the Commission's conclusions upon questions of fact. Indeed, the setting aside of the order is in strict accordance with and demanded by the Commission's conclusions upon questions of fact.

(d) *The foregoing considerations are not affected by the Commission's conclusion that the $2 terminal charge violates Section 3 of the Act.*

The Commission's conclusion that the terminal charge violates Section 3 of the Act relates back to and is sustained solely by the Commission's preceding conclusion that to the extent of one dollar the $2 terminal charge is unreasonable and without justification. The Commission holds

(Record, page 50) that the terminal charge is unduly preferential only to the extent that it is without "some justifying excuse," and the Commission holds the $2 charge unduly preferential to the extent of one dollar only because the Commission is of opinion that to that extent the terminal charge is without sufficient justification.

This point is further illustrated by the Commission's opinions upon the original complaint. The Commission held that the terminal charge, if just and reasonable, would not be an undue preference (7 I. C. Rep., 540), and was an undue preference only to the extent that the charge was unjustifiable (7 I. C. Rep., 555*k*).

V.

The power of the Courts to set aside orders of the Commission.

We believe that this case must be disposed of upon the foregoing considerations, and that it will not be necessary to consider the general question of the extent of the power of the courts to set aside orders of the Commission. But as Commission's counsel refer to that general question, we shall discuss it also.

(*a*) *The Commission's authority is limited by the statute as well as by the Constitution.*

Commission's counsel claim that the Commission can lawfully prescribe any rate which is not so unreasonably low as to deprive the carrier of property without due process of law in violation of the Fifth Amendment to the Constitution.

The Constitution gives Congress the power to regulate commerce among the States. This power has no other limitations than such as are imposed by the Constitution itself.

But the Commission is created by statute and derives its powers solely from the statute, and is limited by the statute, as well as by the Constitution.

The same principle which requires the courts to arrest the enforcement of an act of Congress when that act transcends the limitations prescribed by the Constitution requires the courts to arrest an act of the Commission when that act transcends the limitations of either the Constitution or the statute.

The contention that the courts cannot set aside a rate prescribed by a Commission under legislative authority unless such rate violates the Constitution is apparently based upon observations of this Court in cases involving the question whether the Fourteenth Amendment of the Federal Constitution was violated by rates prescribed under State authority. In those cases this court had no occasion to discuss the question whether the action of the State Commission was in conformity with the State statute. Therefore, such cases are not authority for the proposition that the Federal courts have no power to set aside rates prescribed by a Commission created by a Federal statute, except when such rates violate the Constitution.

To determine the extent of the Commission's power, and the scope of judicial review with respect to the exercise of that power, it is essential to consider what power can be and has been validly conferred upon the Commission by the Act to Regulate Commerce.

(b) The power that can be conferred lawfully upon the Commission.

The question of the extent to which a power to prescribe maximum rates may be intrusted to a commission has been much considered. In an opinion of the Attorney General of the United States to the Chairman of the Senate Committee on Interstate Commerce, dated May 5th, 1905, the prevailing view upon this question was correctly stated as follows:

> "Although legislative power, properly speaking, cannot be delegated, the law-making body, having enacted into law the standard of charges which shall control, may intrust to an administrative body not exercising in the true sense judicial power the duty to fix rates in conformity with that standard" (Hearings before the Committee on Interstate Commerce, United States Senate, volume 2, 1662, 1674).

Thus an essential part of any such delegation of power is that the standard of charges which shall control shall be enacted into law by Congress itself, and thereupon such standard of charges becomes necessarily a rule of law. With respect to such standard of charges the following observations are necessarily true:

First. The standard being a rule of law must be such that the courts can understand it. It is inconceivable in our form of government that any rule of conduct can have the force of law if so peculiar or indefinite in character as not to admit of being understood by the courts. If the standard of charges which shall control the Commission cannot be understood by the courts, then that standard cannot be a law, and there is a complete failure of the basis

which alone can support a delegation of power to the Commission.

SECOND. If the Commission in the attempted performance of its duties is not controlled by the standard enacted by Congress, then the Commission's action is void because in conflict with the law which alone authorizes the Commission to act. It follows that whenever a controversy comes properly before the courts and the rights of the parties depend upon the question whether or not the action of the Commission is valid, the courts have the power to determine whether or not that action conforms to the standard prescribed by law.

(c) *The power that has been conferred upon the Commission.*

By section 15 of the act the Commission is authorized to prescribe a maximum rate only when of the opinion that the rate of the carrier violates the provisions of the act. In that even the Commission is required to "determine and prescribe what will be the just and reasonable rate," to be thereafter observed as the maximum. This is a positive mandate to the Commission to prescribe rates that will conform to the legal standard, and is an equally positive mandate to the Commission not to prescribe rates which do not conform to the legal standard.

The standard which Congress has prescribed is capable of judicial cognizance and if necessary of judicial application. The Commission is to act only when of opinion that the rates or practices of the carrier "are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of

this Act," and in such cases the Commission is required to determine and prescribe "just and reasonable" maximum rates and "just, fair and reasonable" regulations or practices; and the Commission is required to make an order that the carrier "shall cease and desist from such violation to the extent to which the Commission find the same to exist." The standards thus employed by Congress as the rule to control the Commission are the standards which have been in the Act to Regulate Commerce since its original enactment in 1887, and have never been substantially modified since their original adoption. These standards are found in sections 1, 2, and 3 of the Act.

Section 1 provides that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." Section 2 defines "unjust discrimination" to consist in charging one person greater or less compensation than another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Section 3 declares that it shall be unlawful for any carrier to give any undue or unreasonable preference or advantage to any person, locality or description of traffic in any respect whatsoever.

These provisions of the Act have been the subject of judicial cognizance and application from the passage of the Act in 1887. The delegation of power to the Commission by the Hepburn Act has not changed in the slightest the scope or meaning of these provisions. Considerations which the

courts could not have entertained prior to the Hepburn Act cannot properly be entertained by the Commission under the Hepburn Act. The Commission is no more free under the Hepburn Act than were the courts prior to that Act, to enlarge the meaning or operation of sections 1, 2, and 3.

(*d*) *The courts can set aside an order of the Commission for any failure to conform to the statute.*

The Commission's opinion that the rate of the carrier violates the act is not necessarily final. If that opinion is clearly wrong, the courts will disregard it and hold that there is no basis for the Commission's order. Thus in School of Magnetic Healing *vs.* McAnnulty, 187 U. S., 94, it appeared that the statute provided that "the Postmaster General may upon evidence satisfactory to him" that any person is engaged in specified fraudulent schemes instruct postmasters to intercept registered mail addressed to such persons. The Postmaster General "upon evidence satisfactory to him" decided that the School of Magnetic Healing was engaged in a fraudulent scheme and issued an order to intercept registered letters addressed to the school. The Court, notwithstanding the Postmaster General's decision, determined that the school was not a fraudulent scheme, and therefore held the order void.

It is clear that the Commission, under its power to prescribe a rate that conforms to the act, has no power to prescribe a rate that violates the act, and that the courts may set aside any such unlawful order.

Upon the question how far the courts may go in overruling the action of an administrative board, Commission's

counsel quotes as follows from Bates & Guild Co. *vs.* Payne, 194 U. S., 106:

> "The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not, ordinarily, review it, although they may have the power, and will occasionally exercise the right of so doing."

It will be observed that the power thus recognized in the Court to review administrative decisions upon mixed questions of law and fact, or of law alone, is a power which may be exercised without any regard to the question whether there has been a violation of the Constitution. It will be observed also that this doctrine was announced with reference to determinations as to the privilege of using the postal service. This Court explained in Public Clearing House *vs.* Coyne, 194 U. S., 497, 506, that the privilege of using the postal service is a matter within the discretion of Congress, and on a very different footing from the protection of liberty or property, and the administration of public justice. Certainly the owners of railroad property (and "railroads are the private property of their owners"—Int. Com. Com. *vs.* Chicago Great Western, 209 U. S., 108, 118), may rightfully demand a fuller measure of judicial protection against arbitrary administrative action than the Courts may be disposed to accord with respect to the privilege to use the United States mail.

But even according to the rule just quoted from Bates & Guild *vs.* Payne, it is perfectly clear that the Court has

power to set aside an order of the Commission when not in conformity with the law, even if the Constitution be not violated by such order.

It may be that where there is a dispute as to particular facts the Commission's decision would rarely be interfered with. But many of the very important questions involved are matters of deductions from admitted facts. While, doubtless, the Court would be strongly inclined to adopt the Commission's deductions, we submit that there is no rule of law or policy that such deductions must be held to be conclusive.

But after all, most of the important questions are questions of law as to the intent and effect of Sections 1, 2 and 3 of the Act. The Court clearly has the power to set aside an order of the Commission when such order proceeds upon an erroneous construction of the effect of Sections 1, 2 and 3, or, indeed, upon an error of law in any other respect.

It is submitted that it would be extremely unfortunate for the courts to commit themselves unnecessarily at this time to the view that the Commission's conclusions upon questions of law, or the Commission's deductions from admitted facts, are necessarily conclusive. If the original Interstate Commerce Act had given the Commission the power to prescribe rates, and such a doctrine of finality had been attached to the Commission's conclusions upon questions of law and as to the Commission's deductions from admitted facts, the most widespread injustice and injury would have been occasioned. This is evident from a glance at the various decisions in which this Court has had occasion to consider the views of the Commission (see Interstate Com. Com. *v.* Baltimore & O. R. Co., 145 U. S., 263; Texas & P.

Ry. Co. *v.* Interstate Com. Com., 162 U. S., 197; Interstate Com. Com. *v.* Alabama Midland R. Co., 168 U. S., 144; Louisville & N. R. Co. *v.* Behlmer, 175 U. S., 648; East Tenn. V. & G. R. Co. *v.* Interstate Com. Com., 181 U. S., 1; Interstate Com. Com *v.* Chicago Great Western R. Co., 209 U. S., 108).

(*e*) *Judicial intervention is expressly contemplated by the Act itself.*

The courts in exercising their full power to determine whether the orders of the Commission conform to the statute will do only what is contemplated by the act itself.

Section 15 expressly recognizes that the orders of the Commission may "be suspended or set aside by a court of competent jurisdiction." Section 16 prescribes the venue of such suits and expressly provides that "jurisdiction to hear and determine those suits is hereby vested in such courts."

(*f*) *Judicial intervention is especially appropriate because the regulation is of vested rights, and not of matters wholly within the power of the Government.*

In this respect there is an important distinction between the regulation of railroad rates and regulations regarding the disposal of Government lands, or the transmission of matter in the United States mails, or the exclusion of aliens or of imports. All of these matters are solely within the control of the Government, and individual privileges in respect thereto exist solely by virtue of governmental consent. Therefore, as to such matters, method of administration may be appropriate which would be wholly inappropriate with respect to

matters involving important vested rights. The right of the owners of railroads to adequate protection in the enjoyment of their business is a right which exists independent of the consent of the Government.

(g) *Such judicial intervention is consistent with all the authorities.*

There is nothing in the expressions of the courts in other cases to cast doubt upon the right of the courts to inquire into any sort of illegality in the Commission's orders.

Such inquiry does not partake in any sense of the character of rate making. The Court does not make a rate when it ascertains and declares an order of the Commission to be unlawful. Obviously this is true when the Court declares such order to violate the Constitution, and it is equally true when the Court declares such order to violate the statute for any reason.

The expressions of this Court in cases of State action arising under the Fourteenth Amendment are not applicable. This Court properly accepts the action of the State tribunals as being in accord with the laws of the State, and hence no question arises as to whether the rates prescribed are in conformity with the delegation of power to the State Commission. The question that does arise is whether contrary to the Fourteenth Amendment the State has deprived a person of property without due process of law or denied the equal protection of the laws.

Respectfully submitted.

WALKER D. HINES,
Of Counsel for Appellees.